United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74—2120

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FOR THE SECOND CIRCUIT

Docket No. 74-2120

DORMAN L. BAIRD and DORIS J. BURNS,
Plaintiffs-Appellants,

against

DAY & ZIMMERMANN, INC., REVERE COPPER & BRASS, INC., and LEAR SIEGLER CO. INC.,
Defendants,

and

HARVEY ALUMINUM (Incorporated),
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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Preliminary Statement

On June 13, 1974, the District Court (Cannella, D. J.) granted the motion of Defendant-Appellee Martin Marietta Aluminum, Inc. ("MM Aluminum")* to dismiss the complaint as to it for lack of personal and suoject matter jurisdiction. The District Court granted this motion on the grounds that (1) the Court lacked personal jurisdiction

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* "MM Aluminum" is utilized to refer to both Martin Marietta Aluminum, Inc. and its predecessor, Harvey Aluminum (Incorporated).

over MM Aluminum, a California corporation which does not do business in the State of New York; and (2) the Court lacked subject matter jurisdiction over MM Aluminum because the federal courts sitting in New York are required to apply the New York statute prohibiting New York courts from entertaining suits by non-residents against foreign corporations which do not do business in New York. On July 29, 1974, the District Court entered an order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure directing the entry of final judgment dismissing the complaint as to MM Aluminum. Final judgment in favor of MM Aluminum was entered on July 30, 1974. Plaintiffs appeal from that final judgment.

Statutes and Rules Involved

The statutes and rules involved in this appeal are Sections 301, 302 and 313 of the New York Civil Practice Law and Rules ("CPLR"); Section 1314 of the New York Business Corporation Law ("BCL"); and Rules 4(d) and (e) of the Federal Rules of Civil Procedure. Relevant parts of these provisions are printed at the end of this brief.

Question Presented

The question presented on this appeal is whether a foreign corporation is doing sufficient business in New York to subject it to jurisdiction in the New York courts when the corporation's only recurring contact with this State arises from the shipment of its products into this State in response to orders (1) received outside New York, or (2) solicited by a subsidiary which lacked the power to accept or confirm sales on behalf of the foreign corporation.

Statement of the Case

The Nature of the Case

Plaintiffs seek money damages based on various theories of tort and contract law as a result of a howitzer explosion

which occurred in Vietnam in 1969, injuring plaintiff Baird and causing the death of plaintiff Burns' husband. The various defendants are alleged to have been involved in the processing of certain components of the howitzer shell which purportedly caused the explosion. MM Aluminum is alleged to have loaded, assembled and packed the fuze supposedly attached to this shell. Regardless of the merits of these claims, however, MM Aluminum was properly dismissed as a party to this action because, as the Court below found, that corporation does not do business in this State and, therefore, is not subject to the jurisdiction of the New York courts under the circumstances of this case.

The Course of the Proceedings

Plaintiffs commenced this action against MM Aluminum and three other corporate defendants by filing a Complaint in the United States District Court for the Southern District of New York on July 19, 1971. [JA at 2.]* Plaintiffs asserted the diverse citizenship of the parties as the basis for subject matter jurisdiction in the Court below. [Comp. ¶ 1.] Personal service of the Summons and Complaint upon MM Aluminum was attempted in Torrance, California on July 21, 1971. [JA at 16.] On October 21, 1971, MM Aluminum filed its Answer, denying the material allegations of the Complaint and asserting several affirmative defenses, including lack of jurisdiction and improper venue. [JA at 2; Ans. of MM Aluminum ¶¶ 46, 48.]

On January 28, 1974, after plaintiffs had been afforded ample opportunity for discovery both on the merits of the case and on the jurisdictional issue, MM Aluminum moved to dismiss the Complaint as to it pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. This motion sought dismissal on the grounds that the District Court lacked personal and subject matter jurisdiction over MM Aluminum since that corporation was not doing business in this State

* "JA" refers to the Joint Appendix.

within the meaning of the applicable jurisdictional statutes and rules. [JA at 3, 6-7.] Plaintiffs opposed this motion and the District Court ordered that an evidentiary hearing be held on the issue of jurisdiction.

Prior to that hearing, MM Aluminum produced to the plaintiffs hundreds of corporate and financial records relating to its business activities and to its relationships with its parent corporation, Martin Marietta Corporation ("Martin Marietta"), and one of its subsidiaries, Martin Marietta Aluminum Sales, Inc. ("MM Sales"). At the evidentiary hearing, held on March 26, 1974, three witnesses testified in support of the motion to dismiss.

On June 13, 1974, the District Court filed a Memorandum Opinion granting MM Aluminum's motion to dismiss the Complaint as to it for lack of personal and subject matter jurisdiction. [JA at 5, 69-74.] MM Aluminum then moved for an order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure directing the entry of final judgment in its favor. Finding that there was no just reason to delay the entry of final judgment as to MM Aluminum, the District Court granted this motion on July 29, 1974. Final judgment in favor of MM Aluminum was entered on July 30, 1974. Plaintiffs noticed this appeal on August 13, 1974. [JA at 5.]

Statement of Facts

None of the parties involved in this appeal is a resident of New York. Plaintiff Baird is a citizen of the State of Alabama; plaintiff Burns a citizen of the State of Washington. [Comp. ¶¶ 2-3.] MM Aluminum, a California corporation, has never been authorized to do business in the State of New York. In 1971, when this action was commenced, MM Aluminum maintained its principal place of business at Torrance, California. [JA at 8-9, 42-43.]

MM Aluminum has never maintained any facilities in this State nor has it ever held itself out to the public as a

corporation doing business in New York. It never engaged in the manufacture or assembly of any products in New York. Nor did it own, use, possess or operate any office, plant, or facility of any kind in this State, nor own or lease any real estate in New York, nor maintain any bank accounts in New York at any time relevant to the issue before this Court. MM Aluminum did not have a New York mailing address at any relevant time. [JA at 8-10, 42-43.]

MM Aluminum's only recurring contact with this State is the shipment of its aluminum products to New York customers. During 1971 and earlier, MM Aluminum shipped its products into New York by common carrier, f.o.b. place of manufacture. During that period MM Aluminum made the majority of its sales to New York customers through orders placed by these customers with MM Aluminum employees located outside New York or through orders placed outside New York by customers located outside this State but who requested delivery in New York. No employee of MM Aluminum has acted as a New York sales representative during the entire 20 year period covered by the corporation's records on this matter. [JA at 9-10, 44-45.]

Some of the New York orders for MM Aluminum's products were solicited by employees of MM Sales, a subsidiary of MM Aluminum which is authorized to do business in New York. During 1971, MM Sales operated two offices in New York, which were leased in the name of MM Sales and maintained by that corporation. The employees who staffed these offices were paid by MM Sales. MM Sales keeps its own corporate records. [JA at 9, 12, 34-37.]

Under an agreement with MM Aluminum, MM Sales serves as an independent contractor authorized to solicit orders for the products of MM Aluminum. This agreement states in relevant part:

> "5. Harvey Aluminum reserves the right to refuse to sell to anyone.

"6. Aluminum Sales shall in all respects be deemed an independent contractor. This Agreement shall not be assigned by Aluminum Sales either in whole or in part, whether voluntary or involuntary, and whether by operation of law or otherwise, without the written consent of Harvey Aluminum first had and obtained.

"7. Harvey Aluminum will set all price schedules, terms and conditions of sale.

"8. Aluminum Sales shall pay all of its own costs and expenses." [JA at 68.]

MM Sales did not act as the New York agent for MM Aluminum, and no employee of MM Sales has ever had the authority to accept orders or to confirm sales on behalf of MM Aluminum. These employees forwarded all orders to MM Aluminum for final approval and MM Aluminum disapproved a number of orders forwarded by MM Sales in 1971 and earlier. [JA at 10, 12, 14-15, 32-34, 55-56.]

In addition to solicitation of sales from customers located in New York, MM Sales' offices in New York were also responsible for soliciting orders from other states and, therefore, of the 2% of MM Aluminum's sales attributable to solicitations by MM Sales' New York offices a large part of these shipments was made to customers not located in New York. Similarly, since MM Aluminum shipped 5.5% of its total output to New York, the substantial majority of orders for these products was obtained directly from customers and without the assistance of MM Sales employees. [JA at 9, 43-44.]

For the orders which were solicited by MM Sales and accepted by MM Aluminum, MM Sales was paid a commission by MM Aluminum. Approximately 3% of the income of MM Sales in 1971 was attributable to commissions resulting from solicitations in New York of orders for MM Aluminum's products. [JA at 12, 35-36.] MM Sales engaged in substantial independent manufacturing activities

outside the State of New York from which it derived 76.7% of its income in 1971. [JA at 12.]

Similarly, the relationship between MM Aluminum and Martin Marietta, its corporate parent, can afford no basis for personal jurisdiction over MM Aluminum. In 1971, Martin Marietta owned 82.7% of the outstanding common st ck of MM Aluminum; the remaining shares were owned by the public. [JA at 43.] While Martin Marietta maintains offices in New York City, MM Aluminum did not lease space in these offices or share them in any other way. [JA at 10.] Martin Marietta provides various corporate services to MM Aluminum for which MM Aluminum paid a fee to its parent. Plaintiffs failed to establish that these services required the presence of MM Aluminum employees in New York in 1971 and, for later years, could only establish that the use of these services required nothing more than an occasional visit to New York by personnel of MM Aluminum. [JA at 47.] Accordingly, neither the presence of Martin Marietta in New York nor the relationship between that corporation and MM Aluminum has any bearing on the issue presented on this appeal.

Argument

The legal issue presented on this appeal is whether MM Aluminum was doing sufficient business in the State of New York in 1971 to render it amenable to *in personam* jurisdiction in the courts of this State. The facts of this case are simple and clear and show that MM Aluminum is not, and was not at any time relevant to this action, subject to personal jurisdiction in New York. In a diversity case, Rules 4(d)(7) and (e) of the Federal Rules of Civil Procedure require a federal court to test the sufficiency of out-of-state service on a foreign corporation by the constitutionally valid law of the state in which the court sits. *Arrowsmith* v. *United Press International,* 320 F.2d 219 (2d Cir. 1963). Thus, the governing law in this case is Section 313 of the

New York CPLR. That section provides that service outside New York is valid only if the significant contacts between a defendant and New York required for jurisdiction under CPLR 301 or 302 are present. Furthermore, if it cannot be established that MM Aluminum satisfies the jurisdictional requirements of these sections, then a federal court sitting in New York lacks subject matter jurisdiction over the action because those courts are required to apply the New York "door-closing" statute, BCL 1314, which precludes suit against a foreign corporation in the circumstances presented by this case.

Point I of this argument shows that MM Aluminum was not doing business in New York within the meaning of CPLR 301. Point II of this argument establishes that plaintiffs cannot obtain jurisdiction under CPLR 302. Finally, Point III demonstrates that the New York "door-closing" statute precludes suit against MM Aluminum in New York.

POINT I

The District Court Correctly Concluded That It Lacked Jurisdiction Over MM Aluminum.

A. *Plaintiffs Failed To Carry Their Burden of Proof.* Under New York law,* the burden of proving that a New York court has jurisdiction over a foreign corporation rests upon the party asserting jurisdiction. This rule applies to cases arising under CPLR 301 or 302. *Evans* v. *Erie*, 370 F.Supp. 1123, 1127 (S.D.N.Y. 1974); *Charles Abel, Ltd.* v. *School Pictures, Inc.*, 40 App. Div. 2d 944, 339 N.Y.S.2d 242 (4th Dep't 1972); *Lamarr v. Klein*, 35 App. Div. 2d 248, 315 N.Y.S.2d 695 (1st Dep't 1970), *aff'd.*, 30

* Under the doctrine of *Erie R. R.* v. *Tompkins*, 304 U. S. 64 (1938), the placement of the burden of proof is a matter of substantive law and in diversity cases is governed by applicable state law. *Palmer* v. *Hoffman*, 318 U. S. 109, 117 (1943); *Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208 (1939); 1A J. Moore, *Federal Practice* ¶ 0.314[2], at 3506-08 (1959).

N.Y.2d 757, 284 N.E.2d 576, 333 N.Y.S.2d 421 (1972). In *Lamarr v. Klein, supra,* for example, the Appellate Division reversed the lower court's denial of a defendant's motion to dismiss and ordered dismissal, holding that the plaintiff had failed to carry her burden of proving the existence of jurisdiction over that defendant. The Court stated:

> "The law is clear that, under the circumstances disclosed herein, the burden of proving jurisdiction is upon the party who asserts it. (*Unicon Mgt. Corp.* v. *Koppers Co.,* 250 F. Supp. 850; *Saratoga Harness Racing Assn.* v. *Moss,* 26 A D2d 486, *aff'd.* 20 N.Y.2d 733.) In *Saratoga Harness Racing Assn.* v. *Moss* (*supra,* p. 490) of the Appellate Division opinion, the court said: '. . . The plaintiff has the burden of proof and for the purpose of this motion must show by the complaint and supporting affidavits the essential requirements of the statute.' " [35 App. Div. 2d at 250; 315 N.Y.S.2d at 697].

In this case, after hearing the testimony of witnesses and reviewing the exhibits introduced at the evidentiary hearing, the District Court correctly concluded that plaintiffs had failed to carry the burden of proving that their attempted service of process in California conferred jurisdiction over MM Aluminum under any applicable statute.

B. *MM Aluminum Did Not Do Business in New York.* Unless a plaintiff's cause of action arises from a transaction of business in New York or from some activity causing injury in this State, which is not the case here (*see* Point II *infra*), the New York legislature has chosen to subject a foreign corporation to suit in the courts of this State only if that corporation is "present" in New York under traditional common law concepts of jurisdiction. CPLR 301. The requirement of a "corporate presence" is more stringent than the requirements of New York's "long-arm" statute, CPLR 302, and may be satisfied only by a showing that the foreign corporation is "doing business" in New

York.* *Simonson* v. *International Bank*, 14 N.Y.2d 281, 200 N.E.2d 427, 251 N.Y.S.2d 433 (1964). The "doing business" standard means that a corporation's New York activity must be permanent, continuous and systematic, not occasional or casual. *Tauza* v. *Susquehanna Coal Co.*, 220 N.Y. 259, 267, 115 N.E. 915, 917 (1917). There must be continuity of business by the foreign corporation from a permanent locale in New York. *Elish* v. *St. Louis Southwestern Ry.*, 305 N.Y. 267, 269, 112 N.E.2d 842, 843 (1953); *Sterling Novelty Corp.* v. *Frank & Hirsch Distr. Co.*, 299 N.Y. 208, 210, 86 N.E.2d 564, 565 (1949); *Meunier* v. *Stebo, Inc.*, 38 App. Div. 2d 590, 591, 328 N.Y.S. 2d 608, 611 (2d Dep't 1971).

In this case, plaintiffs have shown only that MM Aluminum shipped its products into New York and that some orders for these products were solicited by MM Sales, a subsidiary of MM Aluminum. That neither of these facts establishes jurisdiction over MM Aluminum is made clear by a recent controlling decision of the New York Court of Appeals. In *Delagi* v. *Volkswagenwerk A.G.*, 29 N.Y.2d 426, 278 N.E.2d 895, 328 N.Y.S.2d 653 (1972), the New York Court of Appeals unanimously reaffirmed the long-established rules that (1) a foreign corporation does not do business in New York simply because it ships its products into this State, regardless of the amount of goods conveyed; and (2) the ownership of a subsidiary which does business in New York does not confer jurisdiction over the parent where, as here, plaintiffs cannot show that the subsidiary either

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* The courts of New York have repeatedly held that the New York legislature has not extended the reach of CPLR 301 to the full extent permitted by decisions of the United States Supreme Court. *Simonson* v. *International Bank, supra; Meunier* v. *Stebo, Inc.*, 38 App. Div. 2d 590, 328 N.Y.S.2d 608 (2d Dep't 1971); *Fremay, Inc.* v. *Modern Plastic Mach. Corp.*, 15 App. Div. 2d 235, 222 N.Y.S.2d 694 (1st Dep't 1961) *Martino* v. *Golden Gift, Inc.*, 4 App. Div. 2d 694, 163 N.Y.S.2d 869 (2d Dep't 1957), *appeal dismissed*, 5 N.Y.2d 982, 184 N.Y.S.2d 847 (1959); *Ames* v. *Senco Prods., Inc.*, 1 App. Div. 2d 658, 146 N.Y.S.2d 298 (1st Dep't 1955); *Irgang* v. *Pelton & Crane Co.*, 42 Misc. 2d 70, 247 N.Y.S.2d 743 (Sup. Ct. Nassau Co. 1964).

acted as the parent's agent in this State or was so controlled by the parent as to be a "mere department" of the latter.

1. *MM Aluminum's Shipment of Goods Into New York Does Not Confer Jurisdiction.* In *Delagi v. Volkswagenwerk A.G., supra,* a foreign corporate defendant had established a tightly knit system of distribution by which it shipped substantial numbers of automobiles into New York. Although the defendant's New York wholesale and retail representatives were independent franchisees, the parent corporation was alleged to maintain rigid control over their activities, including the reservation of a right of prior approval of prospective retail dealers. 29 N.Y.2d at 432; 278 N.E.2d at 897; 328 N.Y.S.2d at 656-657. Dismissing the complaint for lack of personal jurisdiction over the foreign defendant, the Court of Appeals emphasized the traditional rule that mere sales of a foreign corporation's products in New York afford no basis for jurisdiction in the courts of this State:

> "We would only add that mere sales of a manufacturer's product in New York, however substantial, have never made the foreign corporation manufacturer amenable to suit in this jurisdiction." [29 N.Y.2d at 433; 278 N.E.2d at 898; 328 N.Y.S.2d at 657.]

Similarly, in *Irgang* v. *Pelton & Crane Co.,* 42 Misc. 2d 70, 247 N.Y.S.2d 743 (Sup. Ct. Nassau Co. 1964), the Court found that the foreign corporation was not doing business in New York and dismissed the action against it. In addition to shipping its products into New York, the foreign corporation employed sales agents who resided in New York, permitted its name to be listed in New York telephone directories and on New York office buildings and sent its officers into New York to represent it at sales conventions. The Court ruled that none of these activities, singly or in combination, sufficed to confer jurisdiction over the foreign corporation. The Court said:

> "The solicitation of business by defendant's traveling salesmen from New York prospects, the solicita-

tion of business by Herodent, Inc., from foreign prospects, and the insertion of defendant's name in the New York-Manhattan telephone book and the directory of an office building, paid for by these salesmen and by Herodent, Inc., for their own convenience, does not constitute doing business in New York. Nor does the added shipping of defendant's products to New York dealers who pay for such deliveries by mailing remittances from New York constitute doing business by defendant in New York. The mere solicitation of business in New York (*Miller* v. *Surf Props.*, 4 N.Y.2d 475, 480) or the mere shipment of goods from outside the State to local buyers on contracts made elsewhere is not sufficient to constitute doing business in this State (*Fremany* v. *Modern Plastics Corp.*, 15 A.D. 2d 235, 237-238 [1st Dept.]). Nor is it sufficient to constitute doing business that the sales representatives, even though exclusively representing defendant in soliciting orders in the State and being paid representative commissions thereon, put defendant's name on the sales representatives' office building directory and in the phone book. (*Vassallo* v. *Slomin*, 278 App. Div. 949 [2d Dept.]). Nor can it be said that the appearance of some of defendant's officers at dental conventions in New York, where defendant's products are displayed and orders sometimes taken, constitute business in this State or shows that defendant is 'here.' (*Tauza* v. *Susquehanna Coal Co.*, 220 N.Y. 259, 268.) The activities of defendant under these circumstances are not 'so systematic and regular as to manifest "continuity of action from a permanent locale" ' (*Elish* v. *St. Louis Southwestern Ry. Co.*, 305 N.Y. 267, 269)." [42 Misc. 2d at 71-72; 247 N.Y.S.2d at 746.]

Accord, *Hastings* v. *Piper Aircraft Corp.*, 274 App. Div. 435, 84 N.Y.S.2d 580 (1st Dep't 1948); *McNellis* v. *American Box Bd. Co.*, 53 Misc. 2d 479, 278 N.Y.S.2d 771 (Sup. Ct.

Onondaga Co. 1967); *John H. Black Co.* v. *Surdam Holding Corp.*, 140 Misc. 113, 250 N.Y.S. 17 (Sup. Ct. Erie Co. 1931) (Shipment of granite to New York customer under contract providing for delivery f.o.b. in another state did not constitute "doing business" in New York).

In this case, MM Aluminum did not employ any personnel to act as resident sales agents in New York, did not maintain a New York office, and did not systematically send its employees into this state on business. MM Aluminum's only recurring contact with New York was the shipment of its products into this State. As the Court below correctly concluded:

> "Nor does the fact that substantial dollar amounts of Aluminum's products were sold in New York alter this conclusion: 'mere solicitation' or 'sales of a manufacturer's product in New York, however substantial, have never made the foreign corporation manufacturer amenable to suit in this jurisdiction.' *Delagi, supra.*" [JA at 72.]

2. *The Presence of MM Sales in New York Does Not Confer Jurisdiction Over MM Aluminum.* In the *Volkswagen* case, the New York Court of Appeals unanimously restated the rule that the operations of an independent subsidiary, which merely solicits orders for the products of its parent but lacks the power to accept or confirm sales on behalf of the parent, do not permit the exercise of personal jurisdiction over the parent corporation. The Court ruled that the New York franchisee had not acted as agent for the foreign corporation and distinguished prior cases validating extra-territorial service on the ground that in those cases the New York agent possessed the authority to make final and binding commitments on behalf of the foreign defendant. This is precisely the power which MM Sales lacked in this case. The Court of Appeals stated:

> "The nature of the agency relationship was clear in *Gelfand,* since the New York agent was author-

> ized to make final reservations, rather than merely confirming availabilities, and the additional factor was present that the purchase of the tour tickets took place in New York. . . . [omitted sentence quoted *supra,* p. 11.] Thus, we conclude that VWAG was not 'doing business' in New York in the traditional sense and, therefore, our courts did not acquire personal jurisdiction over the foreign corporation." [29 N.Y.2d at 433; 278 N.E.2d at 898; 328 N.Y.S.2d at 657-658.]

Although the New York entity involved in the *Volkswagen* case was a franchisee, which the Appellate Division had characterized as defendant's "right arm," [35 App. Div. 2d 952, 953; 317 N.Y.S.2d 881, 883], the Court of Appeals emphasized that the activities of a subsidiary in New York do not confer jurisdiction over a parent, unless the parent's control over the subsidiary is so complete that the subsidiary is actually a mere department of the parent. The Court stated:

> ". . . The control over the subsidiary's activities, we held, must be so complete that the subsidiary is, in fact, merely a department of the parent. (See *Public Administrator of County of N. Y.* v. *Royal Bank of Canada,* [19 N.Y.2d 127, 224 N.E.2d 877, 278 N.Y.S.2d 378 (1967)]) Even if World-Wide were a subsidiary of VWAG, which it is not, the alleged control activities of VWAG would not be sufficient to make World-Wide a mere department of VWAG. (See, e.g., *Fergus Motors* v. *Standard-Triumph Motor Co.,* 130 F. Supp. 780.)" [29 N.Y.2d at 432; 278 N.E.2d at 897; 328 N.Y.S.2d at 657.]

In the instant case, therefore, the ownership by MM Aluminum of a subsidiary which does business in New York does not confer personal jurisdiction over the parent. *Cannon Mfg. Co.* v. *Cudahy Packing Co.,* 267 U.S. 333, 336 (1925); *Blount* v. *Peerless Chem. (P. R.) Inc.,* 316 F.2d 695, 699-701 (2d Cir.), *cert. denied,* 375 U.S. 831 (1963); *State*

St. Trust Co. v. *British Overseas Airways Corp.*, 144 F. Supp. 241 (S.D.N.Y. 1956); *Murray* v. *Plessy, Inc.*, 40 App. Div. 2d 811, 338 N.Y.S.2d 311 (1st Dep't 1972); *Blau* v. *Martin*, 8 Misc. 2d 54, 167 N.Y.S.2d 662 (Sup. Ct. N.Y. Co. 1957).

Since MM Sales lacks the power to accept or confirm sales on behalf of MM Aluminum, solicitation by MM Sales of orders for MM Aluminum's products does not permit the exercise of personal jurisdiction over MM Aluminum. *Miller* v. *Surf Properties, Inc.*, 4 N.Y.2d 475, 151 N.E.2d 874, 176 N.Y.S.2d 318 (1958); *Frummer* v. *Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41, *cert. denied*, 389 U.S. 923 (1967); *Irgang* v. *Pelton & Crane Co., supra; see Davis* v. *Farmers' Cooperative Equity Co.*, 262 U.S. 312 (1923) (A contrary rule would place a constitutionally impermissible burden upon interstate commerce).

In *Miller* v. *Surf Properties, Inc., supra*, the New York Court of Appeals held that extra-territorial service was insufficient to confer personal jurisdiction over a Florida hotel corporation, where the hotel's only regular contact with New York consisted of the solicitation of reservations by its New York travel agent. The Court took great pains to point out that the New York travel agent had no authority to confirm the reservations which he had solicited. 4 N.Y.2d at 480-481; 151 N.E.2d at 876-877; 176 N.Y.S.2d at 321-322. The Court further emphasized that the travel agent's endeavors to persuade customers to take the accommodations which were most profitable to the hotel did not alter this conclusion, since "that kind of activity pertains to salesmanship generally," and "is not the sort of exercise of judgment and discretion within the State which is regarded as controlling" on the jurisdictional issue. 4 N.Y.2d at 481; 151 N.E.2d at 877; 176 N.Y.S.2d at 322.

In *Frummer* v. *Hilton Hotels Int'l, Inc., supra*, the New York Court of Appeals established the standard by which to determine whether the operations of a subsidiary

within New York's borders were sufficient to confer personal jurisdiction over the foreign parent corporation. The *Frummer* Court did not adopt the simplistic notion that a subsidiary acts as the agent of its parent. Instead, the Court of Appeals observed that the subsidiary in question was run on a non-profit basis for the benefit of the defendant foreign corporation and, even more importantly, possessed the authority to accept and confirm room reservations for the foreign hotel. The Court considered it "pivotal" that the subsidiary did all the business which the foreign corporation could have done were it present in New York by its own officials. As the Court said:

> "Moreover, unlike the *Bryant* case (15 N.Y.2d 426, 432, *supra*), where the defendant's New York office did not make reservations or sell tickets, the Hilton Reservation Service both accepts and confirms room reservations at the London Hilton. In short—and this is the significant and pivotal factor—the Service does all the business which Hilton (U. K.) could do were it here by its own officials." [19 N.Y.2d at 537; 227 N.E.2d at 854; 281 N.Y.S. at 44.]

The above decisions make it plain that the presence of MM Sales in this State affords no basis for jurisdiction over MM Aluminum unless (1) MM Sales did "all the business" which MM Aluminum "could do were it here by its own officials" [*Frummer, supra*]; or (2) MM Sales was so completely controlled by MM Aluminum as to be a "mere department" of the latter [*Volkswagen, supra*]. The Court below found that plaintiffs had failed to prove that either of these conditions existed in this case.

The facts of this case conclusively rebut any inference of an agency relationship between MM Aluminum and MM Sales. Unlike the subsidiary in *Frummer, supra,* MM Sales had no power whatsoever to bind its parent, and MM Aluminum refused, in a number of instances, to accept the

orders transmitted by MM Sales. Thus, here, as in *Miller, supra*, it cannot be said that there was any exercise of judgment or discretion within New York by an agent of the foreign corporate defendant sufficient to establish presence in New York. As the District Court properly concluded, MM Sales acted as an independent contractor, not as the agent of its parent:

> "The plaintiffs rely strongly upon a presumption of agency arising from the parent-subsidiary relationship of Aluminum and Sales, but the evidence is uncontested that Sales was employed as an independent contractor devoid of authority to bind Aluminum in any way. Sales could solicit orders, but that is all it was empowered to do. It had no right to confirm sales or to set price schedules, or terms or conditions of sales. At best it could try to obtain orders and transmit them to Aluminum at its home office for acceptance or rejection." [JA at 71.]

MM Sales did not do all of the business which MM Aluminum could have done in New York, since MM Aluminum shipped substantial quantities of its products into New York in response to orders placed by its customers directly with employees of MM Aluminum located outside New York. In fact, substantially less than half of MM Aluminum's sales in this State resulted from solicitations by employees of MM Sales.

Nor is MM Sales a mere department of MM Aluminum. The subsidiary corporation operates substantial manufacturing facilities of its own outside New York. MM Sales has always operated independently of MM Aluminum, maintaining its own facilities, paying its own employees, and keeping its own separate records. Income for these operations was obtained from its independent manufacturing activities and from sales commissions. There is absolutely no evidence that MM Sales was a sham cor-

poration used merely as an "expediency" to "insulate" its parent from jurisdiction. [Plaintiffs' Br. at 16.]

C. *Plaintiff's Cases Are Inapposite.* No case cited by plaintiffs supports their proposition that MM Aluminum should be held to have been doing business in New York at the time this action was commenced. In the first place, plaintiffs cannot dispute the rule that a foreign corporation's shipment of its products into this S ate does not provide a predicate for personal jurisdiction over that corporation. Indeed, all of the cases cited by plaintiffs predate the controlling decision of the New York Court of Appeals in *Delagi* v. *Volkswagenwerk, A.G., supra.* More importantly, the facts of those cases demonstrate that they have no bearing whatever on the issue presented on this appeal.

Thus, plaintiffs themselves recognize that *Tauza* v. *Susquehanna Coal Co., supra,* is clearly distinguishable from this case. There, the defendant corporation had its own sales office and permanent sales manager in New York. Here, the defendant did not. Plaintiffs' analysis of the jurisdictional standard established in the *Tauza* case is misleading for its lack of completeness. [Plaintiffs' Br. at 12.] Although the *Tauza* court found the foreign corporation to be "here" in New York in order to permit an exercise of jurisdiction, it went on to set a standard by which to determine whether such a corporation is, in fact, "here." The Court of Appeals declared:

> "We are to say, not whether the business is such that the corporation may be prevented from being here, but whether its business is such that it *is* here. *If in fact it is here, if it is here, not occasionally or casually, but with a fair measure of permanence and continuity,* then, whether its business is interstate or local, it is within the jurisdiction of our courts [citation omitted]. . . ." [220 N.Y. at 267; 115 N.E. at 917, emphasis in original and supplied.]

As shown above, MM Aluminum's only recurring contact with this State stems from its shipment of goods into New York and this activity is not enough to permit the courts of New York to exercise personal jurisdiction over that corporation.

Similarly, the attempt of plaintiffs to equate the present situation with *Bryant* v. *Finnish Nat'l Airline,* 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965) cannot succeed. Plaintiffs concede that *Bryant* is inapposite since the foreign corporation involved in that case did business in New York through its own employees. Here, no employees of MM Aluminum were located in New York on a permanent basis or, in fact, on any basis at all. Furthermore, as shown above, plaintiffs cannot demonstrate that the subsidiary in question, MM Sales, either acted as an agent of MM Aluminum or was a mere sales department of the latter corporation.

Again, *Boryk* v. *deHavilland Aircraft Co.,* 341 F.2d 666 (2d Cir. 1965) has absolutely no bearing on this controversy because the purported operations of the subsidiary involved were actually carried on largely by employees of the foreign parent who were located in New York. The subsidiary paid bills incurred by these employees in New York. Although some corporate formalities had perhaps been observed, in fact the separate legal identities of each corporation had generally been ignored, as evidenced by the interest-free loans extended to the subsidiary by the foreign parent. 341 F.2d at 667-668. In this case, of course, MM Aluminum had no office or employees in New York. MM Sales maintained its own offices and paid its own employees; MM Aluminum paid no part of these expenses. Furthermore, MM Aluminum paid a reasonable commission to MM Sales for those orders solicited by MM Sales and accepted by MM Aluminum. Finally, the separate legal identities of each corporation have been meticulously preserved both in fact and in theory.

In *Beja* v. *Jahangiri,* 453 F.2d 959 (2d Cir. 1972), this Court found that the defendant had "maintained such [an independent] agency and an office in New York and carried on activities relating to the insurance business for 20 years, which is sufficient to meet the test of permanence and continuity." 453 F.2d at 963. Indeed, the defendant, an insurance company, was required by New York law to maintain such an office in this State. In the case at hand, MM Aluminum maintained no office in New York and employed no personnel located in New York. None of the activities of MM Aluminum meets the test of "permanence and continuity" which must be satisfied before a foreign corporation can be burdened with litigation commenced in this State.

Recognizing MM Aluminum's lack of contact with this State, plaintiffs attempt to create the necessary contacts with assertions of facts found nowhere in the record on appeal or of facts which the District Court found irrelevant. Thus, plaintiffs assert that executives of MM Aluminum "undoubtedly came to New York during 1971 to consult with Aluminum's New York law firm in connection with a public offering of securities." [Plaintiffs' Br. at 12.] There is absolutely no evidence in the record below to support this contention and this Court should refuse to consider it on that basis alone. References to facts not included in the record on appeal are strictly proscribed by this Court. *Dictograph Prods. Co.* v. *Sonotone Corp.,* 231 F.2d 867 (2d Cir.), *appeal dismissed,* 352 U.S. 883 (1956); *Bono* v. *United States,* 113 F.2d 724, 725 (2d Cir. 1940).

Plaintiffs also assert that during 1971 and earlier, MM Aluminum employees "undoubtedly came into New York to consult with [Martin Marietta] executives at the Park Avenue headquarters on numerous occasions." [Plaintiffs' Br. at 9-10.] Plaintiffs concede, however, that there was no evidence of these meetings. [Plaintiffs' Br. at 10.] Instead, plaintiffs rely on evidence that MM Aluminum em-

ployees occasionally travelled to New York to consult with Martin Marietta executives during 1972 and 1973. The District Court, however, indicated at the evidentiary hearing that these facts had no relevance whatever to conditions in 1971, the year in which plaintiffs attempted service upon MM Aluminum in California. [JA at 47-50.] This ruling is beyond question under New York law. *Klein* v. *E. W. Reynolds Co.*, 355 F. Supp. 886 (S.D.N.Y. 1973); *Propulsion Sys., Inc.* v. *Avondale Shipyards, Inc.*, 77 Misc. 2d 259, 352 N.Y.S.2d 749 (Sup. Ct. N.Y. Co. 1973).

Even if this Court were to consider these unsupported allegations, they add nothing to plaintiffs' meritless arguments. In the first place, plaintiffs quite properly concede that the presence of a parent in this State cannot be the predicate for jurisdiction over a subsidiary. *Compania Mexicana Refinadora Island* v. *Compania Metropolitana De Oleoductos*, 250 N.Y. 203, 164 N.E. 907 (1928); *Kohn* v. *Wilkes-Barre Dry Goods Co.*, 139 Misc. 116, 246 N.Y.S. 425 (N.Y. City Ct. 1930). Nor can plaintiffs establish that MM Aluminum is a "mere department" of its New York parent. As the Court below found:

> "Standing alone as it does, this establishes no more than that the parent, for a fee, provided the subsidiary with managerial consulting services such as might be employed in the open market. It does not establish control of the subsidiary by the parent. It was said in this respect in *Delagi:* 'The control over the subsidiary's activities, we held, must be so complete that the subsidiary is, in fact, merely a department of the parent.' This has not been shown here." [JA at 73.]

Instead, plaintiffs claim that MM Aluminum was doing business in New York "based on [MM Aluminum's] activities in obtaining management services from [Martin Marietta] rather than because [Martin Marietta's] activities are being considered the activities of MM Aluminum."

[Plaintiffs' Br. at 24.] The evidence concerning these "activities" during 1972 and 1973 shows that, at most, MM Aluminum employees visited New York only occasionally. [JA at 47.] However, in *Meunier* v. *Stebo, Inc., supra,* the Court held that a foreign corporation was not doing business in New York, even though, among other New York activities, the corporation's employees made *weekly* business trips to this State. *See also Liquid Carriers Corp.* v. *American Marine Corp.*, 375 F.2d 951, 953 (2d Cir. 1967); *Irgang* v. *Pelton & Crane Co., supra; McNellis* v. *American Box Bd. Co., supra.*

Similarly, visits by employees of a foreign corporation to consult with New York attorneys, even if this were shown here, do not confer jurisdiction over the foreign corporation. *Hastings* v. *Piper Aircraft Corp., supra.* Plaintiffs' effort to show merely *occasional* visits to New York by employees of MM Aluminum to receive the benefits of management services from Martin Marietta or to consult with New York attorneys can hardly serve as the basis for jurisdiction over defendant.

Moreover, the cases upon which plaintiffs rely to establish that MM Aluminum's receipt of services from Martin Marietta confers jurisdiction over MM Aluminum actually support MM Aluminum's position. In *Sterling Novelty Corp.* v. *Frank & Hirsch Distr. Co., supra,* the New York Court of Appeals made it clear that it was not confronted with a situation "in which the foreign corporation came but intermittently or sporadically to New York on buying missions and had no fixed local headquarters." 299 N.Y. at 212; 86 N.E.2d at 566. Instead, *Sterling* was controlled "by those cases which hold a foreign corporation subject to the jurisdiction of our courts if it buys merchandise, in a systematic and continuing fashion, through an exclusive purchasing agent with an established and permanent place of business in New York." 299 N.Y. at 212; 86 N.E.2d at 566-567. Similarly, in *Elish* v. *St. Louis Southwestern Ry.,*

supra, not only did the defendant foreign corporation have a New York office where it received tenders of certain of its bonds by mail and held a directors' meeting, the foreign corporation also maintained another office in New York City and one in Buffalo; these offices were staffed by employees of the foreign corporation; the vice president, secretary and assistant treasurer of the foreign corporation had a permanent office in New York. On these facts, the New York Court of Appeals found that the activities of the foreign corporation within New York were "more than casual or occasional, and so systematic and regular as to manifest 'continuity of action from a permanent locale.' " 305 N.Y. at 269; 112 N.E.2d at 843.

As shown above, MM Aluminum's only recurring contact with New York, the shipment of products into this State, affords no basis for jurisdiction under CPLR 301. Occasional visits by MM Aluminum employees to this State, even if these visits were shown in the record, are not the kind of permanent, continuous and systematic activity which the New York courts have demanded as the predicate for personal jurisdiction over a foreign corporation. Accordingly, the District Court holding that MM Aluminum was not present in New York was correct and should be affirmed by this Court.

POINT II

Section 302 of the CPLR Affords No Basis for Personal Jurisdiction

Since they do not advert to this subject in their brief, plaintiffs have apparently abandoned any contention that Section 302 of the CPLR, New York's "long-arm" statute, provides a basis for personal jurisdiction in this case. That statute extended the jurisdiction of the courts of this State to foreign corporations whose "minimum contacts" with New York permitted the exercise of jurisdiction within constitutional limits. *Hanson* v. *Denckla,* 357 U.S. 235

(1958); *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945). In exercising that constitutional power, however, the New York legislature chose to reach only certain carefully defined categories of activity by foreign corporations. None of the causes of action alleged in the instant case arises out of the kinds of activity enumerated in that statute. *Fontanetta* v. *American Bd. of Internal Medicine,* 421 F.2d 355 (2d Cir. 1970). Plaintiffs cannot maintain that any activities of MM Aluminum in New York had any connection with this case. In the absence of some such New York contacts, MM Aluminum cannot be subjected to the jurisdiction of New York courts under CPLR 302. *Tauza* v. *Susquehanna Coal Co., supra; Kramer* v. *Vogl,* 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966); *Feathers* v. *McLucas,* 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965); *Black* v. *Oberle Rentals, Inc.,* 55 Misc. 2d 398, 285 N.Y.S.2d 226 (Sup. Ct. Onondaga Co. 1967).

POINT III

The New York "Door-Closing" Statute Precludes Suit Against MM Aluminum in New York

Section 1314(b) of the New York BCL prohibits New York courts from entertaining suits by non-residents against foreign corporations except in five limited circumstances. Federal courts sitting in this State are required to honor this statutory proscription. *Farrell* v. *Piedmont Aviation, Inc.,* 411 F.2d 812, 815-816, fn. 4 (2d Cir.), *cert. denied,* 396 U.S. 840 (1969); *Woods* v. *Interstate Realty Co.,* 337 U.S. 535 (1949).

Neither MM Aluminum nor the plaintiffs are residents of New York. None of the five exceptions to the statutory prohibition against actions involving non-residents is applicable in this case.

Thus, no New York contract or real property is alleged to be involved, there is no subject matter of this litigation situated in New York, and the causes of action alleged did not arise in New York. BCL 1314(b)(1), (2) and (3). As discussed in Point II, *supra,* none of the jurisdictional prerequisites of CPLR 302 has been met in this case and, consequently, the exception of BCL 1314(b)(4) cannot apply. Finally, as discussed in Point I, *supra,* MM Aluminum is not authorized to do business in New York and, in fact, does not do business in New York. Therefore, the exception of BCL 1314(b)(5) is not applicable.

Since BCL 1314(b) would require that the courts of New York close their doors to the plaintiffs in this action, the District Court correctly concluded that it lacked jurisdiction of the action against MM Aluminum.

CONCLUSION

As shown above, MM Aluminum's contacts with New York can hardly be characterized as permanent, systematic and continuous. Its only recurring contact with this State, the shipment of its products to New York customers, has never been viewed by the courts of New York as a sufficient predicate for jurisdiction under the "doing business" statute, CPLR 301, and a unanimous New York Court of Appeals recently reaffirmed this long-standing rule in *Delagi* v. *Volkswagenwerk A.G., supra.* Plaintiffs could provide no evidence in the District Court to dispute the fact that MM Sales served only as an independent contractor soliciting orders for its parent's products and, therefore, the activities of the subsidiary afford no basis for personal jurisdiction over MM Aluminum. Since plaintiffs cannot show continuity of business by MM Aluminum from a permanent locale in New York, which is essential to an assertion of jurisdiction under CPLR 301, the legislature and courts of New York do not permit the exercise

of personal jurisdiction over MM Aluminum. For these reasons, this Court should affirm the judgment of the District Court dismissing the Complaint as to MM Aluminum for lack of personal and subject matter jurisdiction.

Respectfully submitted,

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STATUTES AND RULES

N. Y. CIVIL PRACTICE LAW AND RULES

SECTION 301

A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.

SECTION 302

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

* * *

(c) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

SECTION 313

A person domiciled in the state or subject to the jurisdiction of the courts of the state under section 301 or 302, or his executor or administrator, may be served with the summons without the state, in the same manner as service is made within the state, by any person authorized to make service within the state who is a resident of the state or by any person authorized to make service by the laws of the state, territory, possession or country in which service is made or by any duly qualified attorney, solicitor, barrister, or equivalent in such jurisdiction.

N. Y. BUSINESS CORPORATION LAW

SECTION 1314

(a) An action or special proceeding against a foreign corporation may be maintained by a resident of this state or by a domestic corporation of any type or kind for any cause of action.

(b) Except as otherwise provided in this article, an action or special proceeding against a foreign corporation may be maintained by another foreign corporation of any type or kind by a nonresident in the following cases only:

(1) Where it is brought to recover damages for the breach of a contract made or to be performed within this state, or relating to property situated within this state at the time of the making of the contract.

(2) Where the subject matter of the litigation is situated within this state.

(3) Where the cause of action arose within this state, except where the object of the action or special proceeding is to affect the title of real property situated outside this state.

(4) Where, in any case not included in the preceding subparagraphs, a non-domiciliary would be subject to the personal jurisdiction of the courts of this state under section 302 of the civil practice law and rules.

(5) Where the defendant is a foreign corporation doing business or authorized to do business in this state.

(c) Paragraph (b) does not apply to a corporation which was formed under the laws of the United States and which maintains an office in this state.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 4(d)(3) AND (7)

(d) Summons: Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

* * *

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

* * *

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule,

it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

RULE 4(e)

(e) Same: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

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